

Repossession Pitfalls under the SCRA

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One of the really great things about my job is the interesting questions my clients send me. The Servicemembers Civil Relief Act provides no shortage of tough questions. As everyone knows by now, the SCRA prohibits a creditor from repossessing property, including a car, without a court order if the servicemember entered the military after financing the car.

Well, let me amend that. Although the Department of Justice has brought many cases against creditors for repossessing cars without first getting court orders, and has ordered them to pay servicemembers many millions of dollars in restitution for these repossessions, creditors still make basic mistakes. In the most recent case, HSBC Finance Corporation settled SCRA repossession claims with the Justice Department last month. HSBC agreed to pay 75 servicemembers \$434,500 for wrongful repossessions that occurred from 2008 to 2010.

The millions that creditors have paid in restitution to consumers may actually be cheap compared to the reputational harm. The Justice Department's press releases announcing SCRA actions contain harsh language. The creditor "repossessed cars without taking into account their owners' ongoing service to our country." "The Department of Justice will continue devoting time and resources to protect our service members and their families from such unjust actions and hold bad actors accountable." "No servicemember should be penalized for honorably serving our country." Ouch!

But what about creditor actions that don't seem like a repossession? Here's the call I got recently. A creditor said it received notice that a car it financed had been impounded. To protect the collateral, the creditor claimed the car from the storage facility. The creditor risked losing the car if the impound authority sold it to pay the borrower's fines and storage fees.

Somewhere along the line, the creditor learned that the car belonged to a servicemember who was covered by the SCRA. This wasn't really a repossession, the creditor reasoned. Could it now sell the car?

First, just because the creditor didn't send a tow truck to the servicemember's driveway doesn't mean there was no repossession. The creditor took possession of the car and was prepared to sell it because the servicemember breached the financing contract when the car was impounded. Servicemembers can waive their rights under the SCRA, as

they should do in a voluntary repossession, but this person had not signed a written SCRA waiver. So the odds were good that if the servicemember challenged the creditor's action, a court would hold that the creditor repossessed the car without a court order. And if the threat of a Justice Department action isn't enough to ruin your day, know that a wrongful repossession under the SCRA is also a crime, carrying a possible jail term of up to a year.

Second, to get a title that allows the sale of the car, the creditor usually must complete an "affidavit of repossession." If the court had any doubts about whether bailing the car out of the impound lot was a repossession, the creditor's signature on this affidavit would surely resolve those doubts.

My client, quite understandably, was not happy with this advice. He protested that if the creditor had not rescued the car from the impound lot, both the creditor and the servicemember would have lost it. Can the creditor reduce the risk of having its actions viewed as an SCRA violation if retrieving the car was in the mutual interest of the servicemember and the creditor?

At this point, I conferred with my very smart partner Tom Buiteweg, who has wrestled with repossession dilemmas for a long time. Assuming it makes economic sense for the creditor to pay the fees to release the car, how can the creditor do so without tripping over the SCRA repossession ban?

Of course, one way would be to obtain a court order. But that is easier said than done. The SCRA gives courts lots of options to protect a servicemember's interests in a repossession. The court can order the creditor to return all or any part of the payments the servicemember made under the contract. The court can put the repossession on hold for as long as it believes is fair. Or the court can take any other action that fairly preserves the interests of the servicemember and the creditor. In short, the creditor does not necessarily waltz out of the courthouse with a quick order.

Another option might be to return the car to the servicemember - without requiring the servicemember to reimburse the creditor's costs as a condition of the return. The creditor could still add these costs to the servicemember's balance if the contract and state law permit. If the creditor were to condition the return on the payment of the fees it paid to the storage facility or other past due amounts, a court or regulator would be more likely to conclude that the offer to return the car was really a post-repossession offer to reinstate the account. And that definitely would not solve the creditor's SCRA problem.

In the end, it will often not make economic sense for the creditor to bail the car out of the impound lot. Abandoning the collateral may be less expensive than the costs in money and reputation of an SCRA enforcement action.

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